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In the Supreme Court of the United States

KINGDOMWARE TECHNOLOGIES, INC.,
PETITIONER

v.

UNITED STATES,
RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF AMICI CURIAE NATIONAL VETERAN SMALL BUSINESS COALITION ET AL. IN SUPPORT OF PETITIONER

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The National Veteran Small Business Coalition, the Task Force for Veterans' Entrepreneurship, Division Construction Inc., Spartan Medical Inc., Women Veterans Business Solutions LLC, and Crosstown Courier Service, Inc. submit this brief in support of Kingdomware Technologies, Inc.'s Petition for Certiorari.[1]

INTEREST OF AMICI CURIAE

The National Veteran Small Business Coalition ("NVSBC") was formed in 2010 with the express purpose of leveling the playing field for veteran-owned and service-disabled veteran-owned small businesses in federal contracting. On behalf of more than 200 members, the NVSBC promotes enhanced opportunities for veteran-owned and service-disabled veteran-owned small businesses to participate in federal contracting and subcontracting.

The Task Force for Veterans' Entrepreneurship ("Vet-Force") is composed of over 200 organizations and affiliates representing thousands of veterans throughout the United States, many of which own small businesses. Vet-Force advocates for veteran entrepreneurs, monitors the implementation of veterans' programs, and promotes opportunities for veterans seeking to succeed in small business.

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[1] Pursuant to Sup. Ct. R. 37.2(a), amici provided timely notice of their intention to file this brief. The parties have consented to the filing of this brief. Counsel for amici authored this brief in whole and no other person or entity other than amici, their members or counsel made a monetary contribution to the preparation or submission of this brief.

Division Construction Inc. ("DCI") was incorporated in 2013 by a former United States Navy air traffic controller who now wholly owns and operates the company. DCI provides quality construction services with a focus on electrical and control contracts primarily for the Department of Veterans Affairs ("VA") in the New York City metropolitan area. DCI also provides construction management services, general contractor services, and supply services. Since incorporation and immediate verification as a service-disabled veteran-owned small business, DCI has allowed its owner and employees the opportunity and privilege to continue serving the United States by providing quality and timely construction services at VA medical facilities.

Spartan Medical Inc. was founded in 2008 by a former Air Force intelligence officer in an effort to provide an extensive array of advanced medical devices and technologies focused on the needs of the VA and Department of Defense. Spartan Medical collaborates with ethical manufacturing partners to provide innovative, state-of-the-art medical devices and technologies that meet the ongoing challenges of surgical and clinical care. Spartan Medical is a service-disabled veteran-owned small business, verified as such by the VA.

Women Veterans Business Solutions LLC ("WVBS") is a small market research and public opinion polling organization that has operated in Philadelphia, Pennsylvania since 2006. A service-disabled veteran-owned small business, WVBS facilitates networking among women veterans for business and employment purposes. WVBS also

performs market analysis and research with respect to economic issues faced by women veterans, including women veterans who consider contracting with the VA.

Crosstown Courier Service, Inc. ("Crosstown") of Chicopee, Massachusetts is a service-disabled veteran-owned small business that also employs other veterans. Established in 1998, Crosstown provides delivery, logistics, and warehousing services to the VA and other clients nationwide. Prior to an abrupt reduction in contracting opportunities with the VA, Crosstown provided time-sensitive transportation of diagnostic specimens to laboratories, among other services to the VA. Crosstown protested before the Government Accountability Office ("GAO") the VA's compliance with the statute at issue in this case, and the GAO sustained Crosstown's protest in 2012. The VA declined to implement the GAO's recommendation.

The panel majority's opinion interpreting the Veterans Benefits, Health Care, and Information Technology Act, Pub. L. No. 109-461, 120 Stat. 3403 (the "2006 Act") affects not only Kingdomware Technologies, Inc., but 2.5 million veteran-owned small businesses throughout the United States, including DCI, Spartan Medical, WVBS, Crosstown, and many of the members of NVSBC and Vet-Force. The panel majority's opinion severely undermines the ability of veteran-owned small businesses and service-disabled veteran-owned small businesses to transact with the VA, contrary to federal law and Congress's express purposes.

SUMMARY OF ARGUMENT

No statute could repay the debt our nation owes its veterans. But veterans are entitled to expect that the terms of the statutes that are enacted—here, a nine-year-old statute with a mandatory provision providing a targeted opportunity to bid on contracts with the VA—are interpreted correctly, and in accordance with Congress's express directions and purposes. The panel majority's decision failed to live up to that basic expectation.

The effect of the panel majority's misreading is grave. By reading out the mandatory mechanism of the statute in favor of a non-binding, prefatory statement, the panel majority diminished the statutorily protected opportunity of veteran-owned small businesses ("VOSBs") and service-disabled veteran-owned small businesses ("SDVOSBs") to do business with the VA.

Data from 2007 indicate that an estimated 60% of the VA's purchases may be conducted through the Federal Supply Schedule ("FSS")—and therefore outside competitive bidding—in a given year. Pet. 35; *VA Acquisition Regulation*, 74 Fed. Reg. 64,619, 64,624 (Dec. 8, 2009).[2] The practical effect of the panel majority's decision is that roughly $10 billion of the VA's $18 billion in annual purchases may be exempt from competitive bidding by VOSBs and SDVOSBs. As such, every single one of the 2.5 million VOSBs (and 200,000 SDVOSBs)[3] that might seek to do business with the VA (especially the tens of thousands that are already registered with the VA) will now have drastically reduced opportunities to compete.

In turn, the panel majority's decision gives new, unwarranted importance to inclusion in the FSS, despite the fact that the FSS is nowhere exempted from the scope of the 2006 Act by the Act's terms, or even mentioned in the Act. Pet. App. 12a.

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[2] The panel majority cited a newspaper article for the proposition that in 2011 the VA used the Federal Supply Schedule ("FSS") for 20% of its total spending. Pet. App. 4a.

[3] The Small Business Administration ("SBA") estimates that there are nearly 2.5 million veteran-owned small businesses today. *See* Small Business Administration, *Veteran-owned Businesses and their Owners—Data from the Census Bureau's Survey of Business Owners*, 1 (Mar. 2012), http://www.sba.gov/sites/default/files/393tot.pdf. The SBA estimates that there are roughly 200,000 service-disabled veteran-owned businesses. *See* Small Business Administration, *Veteran Owned Small Business Contracting Programs* (June 2013), https://www.sba.gov/sites/default/files/SDVOSB_workbook_0.pdf.

The VA's FSS includes a small fraction of the estimated 37,000 registered VOSBs and 12,500 registered SDVOSBs. By elevating the FSS beyond what Congress intended, the panel majority deprived thousands of VOSBs and SDVOSBs of the chance to bid for contracts under the 2006 Act. In limiting the ability of VOSBs and SDVOSBs to contract with the VA, the panel majority's ruling undermined the 2006 Act and removed a crucial stepping-stone for VOSBs and SDVOSBs to succeed. Barry L. McVay, *Getting Started in Federal Contracting*, 183 (5th ed., 2009) ("One of the most direct ways the government can encourage and nurture small businesses is through federal contracts.").

Nor will the panel majority's decision avoid the harm it believes would flow from the interpretation urged by the GAO, the Petitioner, and Judge Reyna's dissenting opinion. The panel majority eliminated the effect of the word "shall" in 38 U.S.C. § 8127(d) out of concern that it would be burdensome for VA contracting officers to execute garden-variety procurements under a veteran-friendly scheme, *cf.* Pet. App. 19a-20a, even if the contracting officer might determine that the VA could get a better deal through a competitive bid than through the FSS. But in rewriting the word "shall" and tethering the VA contracting officers to the VA's daily progress towards its annual goals, the panel majority's decision causes the very harm it purports to avoid.

Under the panel majority's interpretation, each VA contracting officer must now hesitate before executing a procurement decision and attempt to ascertain the VA's progress towards its annual

contracting goals. In addition to creating immediate uncertainty for VOSBs and SDVOSBs, the panel majority nowhere explained how a VA contracting officer might accomplish this unusual obligation (which finds no home in the 2006 Act or its implementing regulations).[4] In attempting to avoid an imaginary harm (placing the VA contracting officer in a straitjacket), the panel majority caused a greater one—a cumbersome progress determination before every purchase—that both burdens the contracting officer and harms VOSBs and SDVOSBs. That is the opposite of what Congress intended in enacting the 2006 Act.

The uncertainty created by the panel majority's decision, and the diminished opportunity for thousands of VOSBs and SDVOSBs to do business with the VA, are contrary to federal law and merit this Court's immediate attention. This Court should grant certiorari to ensure that Congress's express statutory mechanism for veteran contracting is preserved.

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[4] Pet. App. 20a. "[T]here is no evidence in the record to show that VA contracting officers rely on, or have access to, these types of [ongoing progress] data in making contracting decisions." Pet. App. 27a (Reyna, J., dissenting).

ARGUMENT

I. The Panel Majority's Decision Dismantles the 2006 Act's Targeted Means of Helping Veterans Build Businesses

The panel majority's misreading of the 2006 Act neutralizes the Act's targeted means of helping veterans build their businesses after completing years of service to the nation.

Section 8127(d)'s mandate that "restricted competition"—in the form of competitive bidding between eligible VOSBs and SDVOSBs—"shall" apply came against the backdrop of persistent, government-wide obstacles to increasing contracting with VOSBs and SDVOSBs. Congress enacted the 2006 Act and its provision targeted to the VA because prior attempts to bolster VOSB and SDVOSB contracting had fallen unacceptably short. Pet. App. 5a. Companies may declare a willingness to hire veterans or do business with VOSBs and SDVOSBs,[5] but, in practice, Congress has determined that pledges and government

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[5] Though many companies profess that they would be happy to hire a veteran or engage with a business owned by a veteran, in practice veterans face obstacles that non-veterans simply do not. *See* Executive Office of the President, Council of Economic Advisers and the National Economic Council, *Military Skills for America's Future: Leveraging Military Service and Experience to Put Veterans and Military Spouses Back to Work*, 4-7 (May 31, 2012), http://www.whitehouse.gov/sites/default/files/docs/veterans_report_5-31-2012.pdf ("Labor Market Challenges for Military Families").

encouragement are not enough, and responded with targeted legislation. Section 8127(d) does not apply to all government purchasing, only that by the VA. Pet. App. 5a. The VA is a fitting department to take on additional responsibility for promoting veteran-owned business contracting.[6] Changing course from prior legislative attempts, the 2006 Act moves from a hortatory model to one that requires specific action by the VA.

The panel majority's recasting of the meaning of the word "shall" in § 8127(d) eliminates an important stepping-stone for VOSBs and SDVOSBs. Founders, owners, and officers of VOSBs and SDVOSBs obtain valuable experience and special skills through their years of service. It should be no surprise that when veterans start small businesses, they often draw on the skills honed as well as the experiences gathered from their years of service to build companies that seek to enhance the lives of their fellow veterans, whether that be through new medical technology, advanced equipment, or other innovative products and services. The panel majority's decision diminishes the opportunity of VOSBs and SDVOSBs to compete for contracts with the VA, and to use such competitive opportunities to make inroads in the private sector. A veteran's small business not only benefits directly from competitive bidding when that mechanism leads to a contract,

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[6] The VA itself embraces this mandate. "This procurement authority, and its subsequent implementation, is a logical extension of VA's mission, to care for our nation's Veterans." Office of Small & Disadvantaged Business Utilization, *Vets First Verification Program*, http://www.va.gov/osdbu/verification/index.asp (last visited Feb. 26, 2015).

but indirectly when competitive bidding opens doors to private sector opportunities. The opportunities afforded by competitive bidding build competency and market presence for VOSBs and SDVOSBs, the benefits of which extend well beyond any one government contract. *See* McVay, *supra*, at 183.

The 2006 Act's mandatory restricted competition provision is no accident; it is designed to use the VA as a targeted incubator for VOSB and SDVOSB contracting. Pet. App. 5a (Congress enacted "a statute specifically and only directed to the VA."). Interpreting the 2006 Act such that it is no longer mandatory in practice, and instead is only mandatory until certain goals are met, deprives VOSBs and SDVOSBs of the targeted support Congress intended those businesses to receive through competition before the VA.

II. The Panel Majority's Decision Distorts the Role of the Federal Supply Schedule to Exempt Billions of Dollars From Competitive Bidding By VOSBs and SDVOSBs

There are thousands of SDVOSBs and VOSBs already registered with the VA, and just a fraction of those businesses are on the FSS. The panel majority permits the VA to resort to the FSS without first allowing SDVOSBs and VOSBs an opportunity to offer competitive bids under § 8127(d)'s mandatory mechanism. Under the panel majority's decision, a federal statute designed to promote thousands if not millions of veteran-owned businesses will now primarily enhance the small fraction of VOSBs and SDVOSBs that are already on the FSS (should they

be chosen by the contracting officer resorting to the FSS). In prioritizing the FSS over the terms of the statute, the panel majority exempted 60% of VA business from competitive bidding, and arrived at a result divorced from what Congress intended.

As of 2007, there were over 12,500 SDVOSBs and 37,000 VOSBs registered in the Contractor Central Registry. *See* Veterans Entrepreneurship and Self Employment: Hearing Before the Subcomm. on Economic Opportunity of the H. Comm. on Veterans' Affairs, 110th Cong. 7-9 (2007) (statement of Anthony Jimenez, President and Chief Executive Officer of MicroTech, LLC). These numbers represent not all VOSBs and SDVOSBs that exist, but merely the subset that has completed all of the necessary administrative procedures to become registered and ready to bid for contracts. *Id.*

The FSS is nowhere exempted from the scope of the 2006 Act, yet the panel majority makes exempting the FSS from the scope of the Act the keystone of its opinion. Pet. App. 3a-4a. In so doing, the panel majority elevates the FSS to a position far removed from the statute's aims. In order to be eligible for an FSS contract, a business must have $150,000 in commercial sales or $25,000 in Government sales annually.[7] In practice, only a limited number of VOSBs and SDVOSBs have been included in the VA FSS.

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[7] Office of Acquisition and Logistics (OAL), *Prospective Contractors*, http://www.va.gov/oal/business/fss/prospective.asp (last visited Feb. 26, 2015).

Publicly available data from the VA and GSA confirm that VOSBs and SDVOSBs are significantly outnumbered on the FSS.[8] The VA FSS Service manages nine multiple award schedule programs under three areas: Pharmaceuticals, Commodities, and Services.[9] On seven of the nine VA Schedules, the number of VOSBs and SDVOSBs range from 0-40. On two of the nine Schedules, there are no VOSBs or SDVOSBs at all. The two largest Schedules (65 II A, "Medical Equipment & Supplies," and 621 I, "Professional & Allied Healthcare Staffing Services") include 4,639 and 2,834 companies, respectively. VOSBs (excluding SDVOSBs) comprise less than 5% and 3% of the businesses included in these two Schedules; SDVOSBs comprise approximately 16% and 8% of the same Schedules.[10]

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[8] The panel majority cited a newspaper article for the proposition that "in 2011, the VA used FSS contracts for 20% of its total spending, and 13% of these FSS expenditures went to VOSBs." Pet. App. 4a (*citing* Kathleen Miller, *Dispute Simmers Between VA and Veteran-Owned Small Businesses*, WASH. POST, Nov. 14, 2011, at A20).

[9] *See* Office of Acquisition and Logistics (OAL), *VA Schedule Programs*, http://www.va.gov/oal/business/fss/schedules.asp (last visited Feb. 26, 2015) (identifying the nine schedules by group number: 65 I B, 65 II A, 65 II C, 65 II F, 65 VII, 65 V A, 66 III, 621 I, 621 II).

[10] These unofficial figures are based on data retrieved on February 24, 2015 from the GSA's publicly available electronic library, which acts as the "one source for the latest GSA contract award information." GSA Federal Acquisition Service, *GSA eLibrary*, http://www.gsaelibrary.gsa.gov/ElibMain/home.do (last visited Feb. 24, 2015). The eLibrary identifies through downloadable Excel tables profile data on contractors presently included the

The panel majority's decision thus diverts billions of dollars from millions of potentially qualified competitors by taking opportunities for VOSB and SDVOSB bids out of the competitive contracting process and reserving them to the FSS. By adopting an approach that immunizes the contracting officers' reliance on the FSS, the panel majority excluded millions of veteran-owned businesses from billions of dollars of contracts.

In no small irony, the VA itself encourages businesses seeking to be placed on the FSS to conduct market research before applying to the FSS, though the VA exempts itself from conducting market research before resorting to the FSS. The VA counsels:

> It is recommended that you conduct market research to identify and assess your competition prior to submitting a proposal. Review current contractor pricing, terms, and conditions available on NAC Contract Catalog Search Tool, GSA eLibrary or GSA Advantage!. Your review of the competition should include: competitor's pricing, delivery times, warranty terms, services, and any other elements that make their

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nine VA FSS schedules. *Id.* (data available for VA's nine schedules searchable by group number). The profile data for each contractor indicates whether the contractor is veteran-owned or service-disabled veteran-owned.

> offering distinct when compared to your own.[11]

The VA's recommendation that market research be conducted is well taken, and applies equally to the VA and its contracting officers.

The panel majority's decision elevates the VA's FSS in a manner contrary to the terms and intent of the 2006 Act.[12] The panel majority's analysis gave pride of place to the FSS despite the fact that the VA FSS is not mentioned in the 2006 Act, and the panel majority misconstrued Congressional silence as an intent to exclude 60% of all purchasing done by the VA from the Act's scope. The harm that this misreading exacts on veteran small businesses warrants the Court's attention.

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[11] Office of Acquisition and Logistics (OAL), *Prospective Contractors* http://www.va.gov/oal/business/fss/prospective.asp (last visited Feb. 26, 2015).

[12] Practitioners immediately called attention to the heightened importance of the FSS under an interpretation that re-wrote the meaning of the word "shall" in § 8127(d). *See, e.g.*, Gunjan Tulati & Joelle E.K. Laszlo, *After Kingdomware, an FSS Contract May Be a Key to the VA's Procurement Castle* 2, (Jan 23, 2013) http://www.globalregulatoryenforcementlawblog.com/uploads/file/alert13010.pdf (noting after the ruling by the Court of Federal Claims in the *Kingdomware* litigation that the result was "positive news for current FSS contract holders" and a potential "Key to the VA's Procurement Castle").

III. The Panel Majority's Decision Creates Significant Uncertainty for Thousands of Companies Doing Business With the VA

The panel majority's decision creates significant uncertainty for those doing business with the VA because the treatment of each contract will depend on a moving target—the VA's progress to date—rather than a mandatory mechanism. The panel majority's decision elevates an aspirational goal at the expense of a mandatory statutory provision, undermining the expectations of those companies that attempt to contract with the VA. The Court should restore the expectations of VOSBs, SDVOSBs, and Congress, who all understand that "shall" means "shall."

Under the proper interpretation of the 2006 Act, and prior to using another procurement method, the VA must first assess whether it can make a purchase using restricted competition (i.e. whether at least two qualified SDVOSB or VOSB bidders exist that can submit offers that lead to an award at a fair and reasonable price and offering best value). 38 U.S.C. § 8127(d); 48 C.F.R. §§ 819.7005, 7006 (SDVOSB and VOSB bidding, relative to other businesses). If the VA concludes it cannot make a purchase using restricted competition, the VA may rely on the FSS to carry out the purchase. *See GAO Report to Congress*, 2012 WL 5510908, at *3 (Comp. Gen. Nov. 13, 2012). But under the panel majority's approach, the VA need not use restricted competition unless the VA in its discretion deems it necessary to meet its purchasing goals. Pet. App. 20a ("[T]he agency need not perform a VOSB Rule of Two

analysis for every contract, as long as the goals set under subsection [§ 8127](a) are met.").[13]

By placing the mandatory clause at the mercy of a prefatory statement, the panel majority's decision deprives both the VA and those businesses seeking to do business with the VA of certainty as to whether and how a given contract will be made available for bid. Depending on how the VA is doing in approaching its goals, a contracting officer may feel compelled to place a contract up for bid, or not. Pet. App. 30a-32a (Reyna, J., dissenting). The panel majority's approach means that the VA itself cannot offer clarity or consistency as to what opportunities are available to VOSBs and SDVOSBs.

The uncertainty caused by the panel majority tracks the VA's recent departure from the settled understanding of the 2006 Act. It was the view of the GAO that the VA abruptly unsettled the expectations of VOSBs and SDVOSBs in 2012 as to the correct interpretation of the 2006 Act. The GAO in *Matter of Aldevra*, 2012 CPD ¶ 112, 2012 U.S. Comp. Gen. LEXIS 69 (Comp. Gen. Mar. 14, 2012) noted that

> although the agency has defended numerous protests before our Office involving precisely this issue, this is the first time that the agency has raised these arguments. Thus, until this protest, the agency had not suggested

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[13] The Rule of Two is a "procedure well-known throughout the Government in connection with award of contracts set aside for competition restricted to small businesses." Pet. App. 5a.

> that the phrase "for purposes of meeting the goals under subsection (a)" as it appears in 38 U.S.C. § 8127(d) grants the agency discretion to decide that in some procurements the mandate in the statute will apply, and in other procurements it will not.

Id. at *8-9. The Court should grant certiorari to eliminate this seesawing and provide clarity for the Department that Congress selected to set the standard for veteran contracting.

Absent reversal by this Court, the panel majority's ruling means that, contrary to Congress's express direction, it will no longer be the case that a competitive bid process between VOSBs and SDVOSBs "shall" be ordered when eligibility and other criteria are met. Instead, and unlike the statutory mechanism directed by Congress, the bid process will depend on moving targets, rendering the likelihood of any bid award for veteran-owned businesses dependent on how many contracts have been awarded to that date (if the contracting officer is even able to obtain such information, which is doubtful).[14] As noted by the dissent, each VA contracting officer must now hesitate before each procurement decision and attempt to ascertain the VA's progress towards its annual contracting goals, even though "there is no evidence in the record to show that VA contracting officers rely on, or have access to, these types of [ongoing progress] data in making contracting decisions." Pet. App. 27a. This obligation to hesitate and conduct an analysis of the

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[14] Pet. App. 27a (Reyna, J., dissenting).

progress of the VA as a whole finds no home in the 2006 Act or its implementing regulations. The uncertain and ad hoc process fashioned by the panel majority is simply foreign to the text and aims of the statute.

IV. The Panel Majority's Decision Makes VA Contracting Less, Not More, Efficient for Veterans and the VA

Implicit in the panel majority's ruling is the apprehension that giving the statute's terms their full effect would hamstring the VA and needlessly burden the contracting officer. *See* Pet. App. 19a-20a (describing as a "concession" Kingdomware's contention at oral argument that "under its interpretation of 38 U.S.C. § 8127(d), the VA must continue to apply a Rule of Two analysis for every contract even after it has met the goals set under § 8127(a)"). This apprehension is misplaced. The true cause for concern is the stifling of veterans' competitive bidding under the panel majority's decision.

The statute mandates the "Use of restricted competition," § 8217(d), not the "Use of veteran-owned small businesses in all cases." Restricted competition—in the form of the application of the Rule of Two—is applied only when "the contracting officer has a reasonable expectation that two or more small business concerns owned and controlled by veterans will submit offers and that the award can be made at a fair and reasonable price that offers best value to the United States." 38 U.S.C. § 8127(d). Absent that reasonable expectation as to the three

essential components (two or more business concerns, fair and reasonable price, and best value to the United States), restricted competition is not even used (under the correct reading of the statute). Fearing imaginary constraints on the VA contracting officers, the panel majority created its own flawed system to the detriment of SDVOSBs and VOSBs.

Protecting the statutory rights of veterans does not mean that VA purchasing will grind to a halt, burdened by needless competitive bidding. The VA is already subject to various other statutory obligations that influence its procurement decisions.[15] The panel majority's weakening of veterans' protections in the 2006 Act does not promote a frictionless, free-market contracting system—just a distorted one that Congress never intended. And aside from the fact that a court should not be guided in its interpretation of a federal statute by what outcome would be easiest for a contracting officer,[16] the panel majority's decision does not even achieve that outcome.

Instead, by allowing the goal-setting language to trump the mandatory language of 8127(d), the statute obligates each contracting officer to conduct a daily determination as to the VA's progress towards

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[15] 48 C.F.R. § 819.7004 (SDVOSBs and VOSBs are followed in priority by small disadvantaged businesses, "Historically-Underutilized Business Zone" businesses, and businesses identified pursuant to any other small business contracting preference).

[16] "[L]egislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *Viegas v. Shinseki*, 705 F.3d 1374, 1380 (Fed. Cir. 2013) (internal quotations omitted).

its goals. Pet. App. 32a (Reyna, J., dissenting) (panel majority's misreading "saddle[s] contracting officers with the obligation in every acquisition to determine the status of the agency's small business goals—expressed as percentages of total awarded contract dollars—but does not elaborate on how contracting officers can determine that these goals have been 'met' before the end of the fiscal year"). This cumbersome, ad hoc process invented by the panel majority makes the VA's job harder, not easier, and forsakes thousands of VOSBs and SDVOSBs.

By placing the word "shall" in "harmonious context," Pet. App. 20a, such that it means "may," the panel majority turned the VA's contracting goals into ceilings. Indeed, under the panel majority's distorted interpretation, the VA would be wrong to exceed its goals by awarding contracts to VOSBs and SDVOSBs in competitive bids once § 8127(d)'s goals had been reached. Pet. App. 29a-30a (Reyna, J., dissenting) (panel majority "finds mischief in requiring contracting officers to continue conducting Rule of Two analyses after the agency's goals are met"); *accord* Pet. App. 32a (Reyna, J., dissenting) ("The majority thus errs when it asserts that an obligatory Rule of Two requirement would obviate the goal-setting provision of the 2006 Veterans Act."). The panel majority's refusal to believe that the mandatory competitive bid mechanism could coexist with the VA's goals, Pet. App. 20a, led the panel majority astray.

A mandatory mechanism is no guarantee of meeting an aspirational goal. Pet. App. 30a (Reyna, J., dissenting) ("[P]articipation goals are aspirations, not destinations."). Parents who load their children

into the car for a trip to the Eastern Shore of Maryland may set the car on cruise control at 55 miles per hour, but that is no guarantee that the family will arrive at a desired time. Attaining that goal depends on the availability of open lanes on the highway, the accessibility of gas stations along the way, the suitability of driving conditions, and a variety of other requirements. Just as the cruise control setting is no guarantee of timely arrival at the shore, so too is the mandatory Rule of Two mechanism no guarantee that the VA will hit its target. Section 8127(d)'s mandatory mechanism is fully consistent with the 2006 Act's aspirational goal. Indeed, it is the panel majority that has reached a dissonant, and not harmonious, result by refashioning beyond recognition the core statutory mechanism for promoting competitive bidding by VOSBs and SDVOSBs.

CONCLUSION

Legislation like the 2006 Act cannot repay a nation's debt; it is just a shadow of the country's gratitude. But the 2006 Act deserves to be interpreted as written.

The panel majority's flawed interpretation of the 2006 Act affects millions of veterans, their businesses, and their employees across the nation. Left undisturbed, the panel majority's interpretation will dramatically reduce the opportunities for VOSBs and SDVOSBs to do business with the Department that Congress selected to uniquely assist veterans' small businesses. The Court should grant certiorari to restore the expectations of veteran-owned businesses and Congress.

For the foregoing reasons, the Court should grant the petition and reverse the decision below.

Respectfully submitted,

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